U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 07Nov2001

Case No: 2001-LHC-0832

OWCP No: 5-102153

In the Matter of:

QUENTIN L. JONES,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,
Employer.

Appearances:

Gregory Camden, Esq.
For Claimant

Jonathan Walker, Esq.
For Employer

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by Quentin L. Jones ("Claimant") for benefits under the Longshore and Harbor Workers' Compensation Act ("the act") as amended, 33 U.S.C. 901 et seq. Claimant seeks temporary total disability benefits for the period October 9, 2000 to December 3, 2000 and temporary partial disability benefits for the period December 4, 2000 to April 29, 2001, based on his actual earnings during that period. The claim is based on injuries to his hip, knee, and elbow. Newport News Shipbuilding and Dry Dock Company ("Employer" or "the shipyard") argues that the claim is barred by the statute of limitations. In the alternative, Employer argues that Claimant's actual earnings do not represent his wage-earning capacity.

The procedural history of this case requires some explanation. The district director issued a compensation award in this case on January 13, 1999. On August 11, 1999, Claimant's counsel wrote to the Office of Workers' Compensation Programs (OWCP) stating that Claimant had a condition which was likely to deteriorate further in the future (CX 17). Therefore, he requested a "minimal ongoing compensation award" based on the United States Supreme Court's decision in Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121 (1997). On August 17, 2001, Employer filed a notice of controversion, form LS-207 (CX 18). No further action was taken in this case until October 13, 2000, when Claimant's counsel wrote to OWCP requesting an informal conference on the issue of permanent total disability benefits (CX 3). The informal conference occurred on November 27, 2000 (CX 6), and the case was subsequently transmitted to the Office of Administrative Law Judges.

A formal hearing was held in this case before me at Newport News, Virginia on June 19, 2001, at which both parties were afforded a full opportunity to present evidence and argument as provided for by law and regulations. Claimant offered exhibits CX 1-18, and Employer offered exhibits EX 1-14.[1] Claimant subsequently withdrew CX 8. All other exhibits were admitted into evidence.

The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulated and I find as follows:

1. That on August 11, 1997, Claimant was in the employ of the shipyard at Newport News, Virginia in the Fifth Compensation District, established under the provisions of the act, as amended and extended; that the liability of Employer under the act was self-insured by Employer;

2. That on August 11, 1997 Claimant, while performing service as a fitter for Employer, sustained an injury to the left arm/elbow and left leg, and such injury comes within the purview of the act;

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[1] The following are references to the record:
CX - Claimant's exhibit
EX - Employer's exhibit
Tr. - Transcript of hearing

3. That written notice of the injury was not given but that Employer had knowledge of the injury and has not been prejudiced by lack of such written notice;

4. That Employer furnished Claimant with medical treatment in accordance with the provisions of section 7 of the act;

5. That Claimant's average weekly wage at the time of the injury was $588.82;

6. That, as a result of the injury, Claimant was totally disabled from November 13, 1997 to March 2, 1998, inclusive, for which he is entitled to compensation for temporary total disability for 15 5/7 weeks, at $372.55 per week, in the amount of $5,854.36;

7. That, as a further result of the injury, Claimant sustained a permanent partial disability equivalent to twenty percent loss of use of the left leg, for which he is entitled to compensation for 57.6 weeks (twenty percent of 288 weeks) at $372.55 per week, in the amount of $21,457.88;

8. That, as a further result of the injury, Claimant sustained a permanent partial disability equivalent to three percent loss of use of the left arm, for which he is entitled to compensation for 9.36 weeks (three percent of 312 weeks) at $372.55 per week, in the amount of $3,487.06; and

9. That accrued compensation of the temporary total and permanent partial disability amounts to $30,800.14, which Employer has paid to Claimant.

(CX 2)

ISSUES

1. Is Claimant's motion for modification barred by the statute of limitations?

2. If the claim is not time barred, has Employer shown suitable alternative employment to demonstrate that Claimant's wage-earning capacity was greater than his actual earnings?

3. If Employer has shown suitable alternative employment, did Claimant conduct a diligent job search?

FINDINGS OF FACT

A. Testimony of Quentin L. Jones

Claimant has been employed by the shipyard for twenty-seven years. He works as a shipfitter, building ships and performing other carpentry duties (Tr. 19). On August 11, 1997, Claimant fell from a ladder, injuring his left arm and knee (Tr. 20). He came under the treatment of Dr. Thomas Stiles, who performed surgery on Claimant's left knee (Tr. 20).

Claimant returned to work in a light-duty position on March 2, 1998 (Tr. 20). He was restricted from lifting, squatting, bending, stooping, or lifting more than fifty pounds (Tr. 20-1). He worked in this position until October 9, 2000 (Tr. 21). Between March 1998 and October 2000, he experienced problems with his right hip (Tr. 21). Employer agreed that Claimant's hip ailment was a result of his 1997 work-related injury (Tr. 22).

In October 2000, Claimant was passed out of work at the shipyard because there was no work available within his restrictions (Tr. 22). An October 13, 2000 letter from Joan Buchanan at the shipyard informed Claimant that he would receive temporary total disability payments if he cooperated with the vocational rehabilitation program (EX 4, Tr. 23). Claimant agreed to cooperate, but he did not receive any compensation payments after being passed out of work (Tr. 23).

Claimant took some vocational tests and participated in the job club program (Tr. 23). He attended the job club, received lists of available jobs from Barbara Harvey, and submitted applications for all of the jobs (Tr. 24-5).

Claimant interviewed for a job at Hawk Security. He was told that the job would require him to be able to apprehend a man who was stealing a car. Due to his injuries, he did not believe he would be able to perform such duties (Tr. 27). On his application for the job, he requested twelve dollars per hour in wages, which he believed he would need to be able to support his family (Tr. 28). However, he did not state that he would refuse the job if the wages were lower (Tr. 28). He thought that a security job would start at about seven or eight dollars per hour, but Hawk would only pay twenty-five dollars per day (Tr. 29).

Claimant stated that he did not turn down an offer from Hawk Security or from any other employer (Tr. 28). However, he later stated that Hawk Security offered him twenty-five dollars per day and he "didn't say nothing. . . what is there to say, you know?" (Tr. 30). He did not provide references on the Hawk application because Harvey, the job club facilitator, had not given a copy of his references to him (Tr. 30). He acknowledged that he did not answer the question regarding whether he had been convicted of a felony, stating that "I probably

overlooked it" (Tr. 31). He did not tell Hawk that he was only available for the first shift,[2] nor did he say that he would not travel (Tr. 31). He also did not state that he only wanted to work at the shipyard (Tr. 31).

Claimant eventually found work as a substitute teacher's aide with the Newport News school system. He accepted that job on December 4, 2000 (Tr. 25). When work was available, the school system called Claimant's house with a teletype system. He would enter his number and go to the jobs. Few jobs were available, and the work was not steady (Tr. 25).

Claimant continued to look for other jobs on his own (Tr. 25). He made a list of nine jobs that he applied for on his own (CX 11). He received a job offer from the City of Hampton Parks and Recreation. On the same day, the shipyard called him back to work. He now works for the city and for the shipyard (Tr. 26). His current duties at the shipyard involve welding and fitting in the X-36 department, and they are suitable to his restrictions (Tr. 27).

B. Testimony of Barbara Harvey

Harvey is the job club facilitator and senior case manager for Concentra Managed Care (Tr. 34). She has a masters degree in human resources management and practices regularly in the profession of vocational rehabilitation counseling (Tr. 34). Claimant enrolled in job club, a four-week program offered by Concentra, in October 2000 (Tr. 35). The four-week job club program consists of one week of classroom instruction and vocational testing, followed by three weeks in which clients receive two job leads per day and go out to apply for the jobs (Tr. 35). Claimant attended four of the first five days of classroom instruction (Tr. 36). He filled out a sample application and provided references (Tr. 36).

Harvey referred Claimant to a job at Hawk Security (Tr. 36). She discussed the job with him before he attended the interview (Tr. 37). She gave him general information about the employer, and she told him that the going rate for this job was generally $5.50 to $6.00 per hour (Tr. 37). She has worked with Hawk Security before and has placed other people in positions there (Tr. 37). After the interview, a Hawk Security manager told her that Claimant:

> had a bad attitude, that he only wanted to work for the shipyard, he didn't want to work security. The employer told [Harvey that Claimant] didn't complete the application, that he really got the impression that [Claimant] didn't want to work the job.

(Tr. 38). Hawk Security documented this assessment for Harvey, reporting that Claimant "had said he didn't want the job" (EX 11-5). The position at Hawk was for an unarmed security

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[2] Contrary to Claimant's testimony, his application form to Hawk Security shows that he circled "1" indicating the first shift and "mornings" concerning when he would be available (EX 11-4).

guard and would not require Claimant to apprehend anyone (Tr. 38). It was an "eyes and ears" position (Tr. 39). Claimant was informed of the nature of the position before he went to the interview (Tr. 38).

Harvey examined Claimant's application, and she agreed that it was incomplete. Claimant did not enter his home address, did not date or sign the application, and did not provide references. He failed to answer the question regarding whether he had a criminal record. He also put down a desired salary of $12.00 per hour and stated that he was only available first shift (Tr. 39). Harvey disagreed with Claimant's testimony that he did not have references because she did not return them to him. Clients provide their own references (Tr. 39). Harvey has placed with Hawk Security workers who had similar or inferior vocational qualifications and work restrictions to Claimant (Tr. 41). There was no question in her mind that Hawk Security would have hired Claimant if he had expressed the desire and motivation to take the job (Tr. 41).

Harvey opined that, on the date of his application at Hawk Security on October 25, 2000, Claimant had a wage-earning capacity of $5.75 per hour, forty hours per week (Tr. 41). She performed a labor-market survey to assess Claimant's vocational capacity (Tr. 42, EX 11, pp. 6-11). She identified jobs that were appropriate to Claimant's vocational capacity and work restrictions. Harvey testified that the jobs were available between November 2000 and March 2001 (Tr. 42).

Altogether, Harvey referred Claimant for approximately thirty-five positions. She followed up on all of the jobs to see if Claimant had applied for them. Approximately half of the employers were able to confirm that he had applied. Only Hawk Security indicated that Claimant had a bad attitude (Tr. 43). Harvey did not send the labor-market survey to Dr. Stiles for approval because Dr. Stiles requires a $25.00 fee for every job analysis. The labor-market survey has not been approved by any physician (Tr. 47). Harvey was not aware that Claimant had any walking or standing restrictions, and she did not take such restrictions into account when she conducted the labor-market survey (Tr. 47). Some job descriptions on the survey did not list a lifting requirement because those jobs did not require any lifting (Tr. 48). Considering all the jobs on the survey, Claimant's earning capacity was up to $11.50 per hour. (Tr. 50). The survey itself stated that Claimant was employable at wages averaging $279.20 per week, or $6.98 per hour over a forty-hour week (Tr. 51, EX 11-8). However, at the hearing, Harvey stated that a wage-earning capacity of $7.25 per hour was a reasonable estimate, based on the average of wages of jobs identified in the labor-market survey (Tr. 51).

Claimant was hired as a substitute teaching aide in Newport News Public Schools on November 28, 2000, with a starting date of December 4, 2000. He was paid $44.00 per day. Harvey did not send him any job leads after November 28, 2000, because he had been placed in a job and was eligible to work five days per week (Tr. 44). The job required him to call in every day to an automatic system that indicated which positions were open on that date. Claimant could choose which specific assignments to accept. Crystal Wilson of the Newport

News Public School Administration Office told Harvey that jobs were available to Claimant five days a week (Tr. 45). Harvey's notes indicated that substitute teacher's aide positions are less plentiful than substitute teacher positions, that substitute teacher's aide positions rarely go unfilled, and that between zero and five positions may be available on a given day (Tr. 46).

C. Claimant's restrictions (EX 7, CX 16-23)

Claimant received several sets of work restrictions based on his injuries. Beginning on July 10, 1998, he was restricted from lifting more than fifty pounds or carrying for more than one hundred feet. He was totally restricted from climbing vertical ladders, crawling, kneeling, or squatting. Inclined ladders were permissible to and from the job only, while frequent stairs and foot controls were allowed (EX 7).

Dr. Stiles issued an additional set of restrictions on January 23, 2001, based on Claimant's hip injury (CX 16-23). These were temporary restrictions to remain in effect until April 24, 2001 (CX 16-23). The restrictions stated that Claimant should not stand for more than five hours or lift more than thirty pounds (CX 16-23).

D. Labor-Market Survey (EX 11-6 through EX 11-11)

This survey shows the results of Claimant's placement tests, where he was listed as "above average" in reasoning, "average" in math, and "below average" in language. Claimant had received a high-school diploma. The survey lists eight jobs with various dates of availability between November 2000 and March 2001. The first job, meter reader for Dominion Virginia Power, required walking for up to six hours or more per day. The other jobs required, at most, alternate sitting, standing, and walking, and lifting of no more than five pounds. The pay scales ranged between $5.15 per hour for Digital Security dispatcher and $11.50 per hour for Dominion Virginia Power meter reader. Some of the jobs required a high school diploma and one required "good math" (EX 11-9).

DISCUSSION

I. Timeliness of Claim

A section 22 motion for modification is timely if it is made any time prior to one year after the rejection of the claim or the last payment of benefits, whether or not a compensation order has been issued. 33 U.S.C. §922. Claimant received a lump sum payment of benefits on October 26, 1998 (CX 1-1). This lump sum represented payment for a twenty-percent disability rating for the lower extremity (57.6 weeks) and a three-percent disability rating to the left upper extremity (9.36 weeks). If the benefits had been paid in weekly installments for a

total of 66.96 weeks, the last payment would have been made on October 19, 1999. Therefore, Claimant argues, his October 13, 2000 motion for modification was timely because it was made within one year of the time that the final payment should have been made according to the schedule.

The Benefits Review Board ("the Board") rejected this exact argument in House v. Southern Stevedoring Company, 14 BRBS 979 (1982). The Board concluded that the plain meaning of the statute was clear on its face and that the one-year period should be measured from the date on which the last payment was actually received. House at 982. Therefore, I reject Claimant's argument on this issue.

However, I find that Claimant's motion was nonetheless timely. On August 11, 1999, Claimant filed a Rambo II petition, alleging that he suffered a continuing disability that would cause a loss of earning capacity in the future (CX 17). I find that this letter constituted a valid section 22 motion for modification. A request for modification need not be formal in nature. Madrid v. Coast Marine Construction, 22 BRBS 148, 152 (1989). It simply must be a writing which indicates the intention to seek further compensation. Madrid at 152. Claimant's letter alleged a change in condition, namely the existence of a continuing disability, and it was filed within a year of the last payment of compensation. Therefore, it constituted a valid section 22 motion for modification.

A section 22 motion tolls the statute of limitations until the claim is adjudicated or withdrawn. Id. See also Fireman's Fund Insurance Company v. Bergeron, 493 F.2d 545 (5th Cir. 1974); In Madrid, the claimant made a series of phone calls to the deputy commissioner, which the deputy commissioner's staff recorded in writing. Madrid at 151. The claimant failed to take any action on the claim for three years. Id. at 152. The Board determined that the claim remained open and pending until it was adjudicated or withdrawn. Id. Furthermore, the claim could only be withdrawn by written request to the deputy commissioner (district director), who must then approve the request as being for a proper purpose and in the claimant's best interests. Id.; 20 C.F.R. § 702.225. In the instant case, as in Madrid, Claimant made a motion for modification that was never adjudicated or withdrawn. Therefore, the statute of limitations did not run, and Claimant's October 13, 2000 motion for modification was timely.[3]

Employer argues that the Rambo II petition should not toll the statute of limitations because Claimant did not show with specificity a significant possibility of future wage loss.

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[3] I am not persuaded by Employer's argument that Claimant's "inertia" prevented the petition from being considered. The act does not put the onus on the claimant to move forward with a case once a claim has been made and notice of controversion has been filed. The regulations make clear that, after the notice of controversion, informal conferences shall be called by the district director. 20 C.F.R. § 702.311. It is not clear why the district director failed to take any action on Claimant's Rambo II petition. However, the record gives me no reason to believe that Claimant was responsible for this failure or to question his motives in filing the petition.

This contention confuses the standard for actually proving a Rambo II petition with the standard for tolling the statute of limitations due to a section 22 motion for modification. The latter requires only an informal complaint, Madrid at 152, which Claimant made.

Employer also contends that Claimant's Rambo II motion should not have tolled the statute of limitation because it was frivolous. Employer argues that Claimant could not have been eligible for a Rambo II award because he had already received a scheduled award. However, the November 2000 informal conference established that Claimant had developed a hip injury (CX 6). Employer agreed to accept this injury as a natural progression of Claimant's scheduled injury (CX 7). The Board stated in Bass v. Broadway Maintenance, 28 BRBS 11 (1994) that, where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant is not limited to one award for the combined effect of his conditions but may receive a separate award under subsection 8(c)(21) for the consequential unscheduled injury in addition to an award for the scheduled injury.

If a hearing had gone forward based on Claimant's Rambo II claim, he may have been able to show that a natural progression of his injury led to an injury to a body part not covered under the schedule.[4] The hip is not listed as a scheduled body part under subsections 8(c)(1)-(20). Rather, hip injuries should be treated as unscheduled injuries under subsection 8(c)(21).[5] I need not decide whether a frivolous claim would toll the statute of limitations because I cannot find based on evidence in the record that Claimant's petition was frivolous at the time it was filed. Therefore, I will consider the claim on its merits.

II. Suitable Alternative Employment

Employer does not dispute that Claimant has made a prima facie case of total disability for the period between October 9, 2000, when he was passed out of work at the shipyard, and April 29, 2001, when he returned. Joan Buchanan, a workers' compensation

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[4] Although the shipyard's agreement to accept Claimant's hip injury as compensable does not constitute proof of Claimant's condition at the time he filed the motion, it demonstrates that a legitimate claim was possible (CX 7).

[5] There is some precedent for treating a hip injury as a type of leg injury under subsection 8(c)(2) of the schedule. Davenport v. Apex Decorating Co., 13 BRBS 1029 (1981). However, it does not appear that the issue of whether a hip injury came under the schedule was ever raised in Davenport. In Strube v. Trans Pacific Container, 32 BRBS 651 (1998)(ALJ), Administrative Law Judge O'Shea considered the issue thoroughly and concluded that a hip injury should be treated as an unscheduled injury separate from a leg injury, just as a shoulder injury is an unscheduled injury separate from an arm injury. Id. at 655; see also Ward v. Cascade General, 31 BRBS 66 (1995) (unscheduled injury to shoulder, although residual symptoms were in wrist), Bivens v. Newport News Shipbuilding, 22 BRBS 233 (1998) (scheduled and unscheduled award where injury was to arm and shoulder). Although Judge O'Shea's opinion is persuasive rather than precedent-setting authority, I agree with the analysis in Strube, and I find that the hip injury should be treated as a subsection 8(c)(21) unscheduled injury.

case manager for Employer, wrote to Claimant on October 13, 2000 stating that he had been passed out of work due to lack of work within his restrictions (CX 4-1). [6]

The burden now shifts to Employer to show the existence of realistic job opportunities which Claimant is capable of performing, considering his age, education, work experience, and physical restrictions. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer must establish the precise nature and terms of job opportunities that it contends constitute suitable alternative employment in order for me to determine rationally whether Claimant is physically and mentally capable of performing the work that is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Under case law in the Fourth Circuit, Employer must show the availability of a range of jobs. Lentz v. The Cottman Company, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988).

A. Availability of a Range of Jobs

I find that Employer has shown a range of nine jobs that were available to Claimant during the critical period: the eight jobs in the labor-market survey and the guard job with Hawk Security (Tr. 41, EX 11-6 through 11, 11). The Hawk Security job was an "eyes and ears" job within Claimant's restrictions (Tr. 37-8). The jobs in the labor-market survey are all appropriate to Claimant's age, education,[7] work experience, and his pre-January 23 physical restrictions. The job with Dominion Virginia Power, which required walking for six or more hours per day, is not compatible with Claimant's standing restrictions, which went into effect on January 23, 2001 (CX 16-23).

B. Date that Total Disability Becomes Partial

Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Dynamic Corp., 25 BRBS 128 (1991). I find that Employer has shown that suitable alternative employment was available to Claimant as of October 25, 2000, when he had an interview with Hawk Security (Tr. 41). I find the

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[6] The letter further stated, "If you are willing to cooperate with our job placement efforts on your behalf, we can pay temporary total benefits" (CX 4-1). Although it is beyond the scope of this case to decide a contract issue between Claimant and Employer, I note that Employer appears to have paid Claimant no temporary total disability benefits for this period. It is unclear why Employer failed to pay the benefits.

[7] The only question regarding Claimant's educational experience might be the dining room cashier position that requires "good math" (EX 11-11). Claimant's math score on aptitude tests was classified as "average." (EX 11-8). This classification includes ability to compute commission, markup, and selling price and perform algebra and geometry (EX 11-8). I find that Claimant's average math skills are sufficient to operate a cash register, which would require him to count money, make change, and balance a register at the end of a shift (EX 11-10).

written statement of Hawk Security that Claimant failed to complete the application and stated that he was not interested in the job (EX 11-5) to be credible. Hawk managers had no apparent motive to lie about Claimant's behavior.

On the other hand, Claimant made several contradictory statements about the interview. He stated that he did not limit his availability to the first shift, but the application indicates that he did (Tr. 31, EX 11-4). He claimed that the interviewer expected him to be able to apprehend car thieves (Tr. 27). Harvey, who had worked with Hawk Security in the past and was aware of Claimant's restrictions, stated that it was an "eyes and ears" job and therefore was within his restrictions (Tr. 37-8). I find Harvey's statement to be more credible because she had an interest in placing Claimant in a job, and it is unlikely that she would have referred him to a job that was incompatible with his known restrictions. In fact, Claimant equivocated regarding whether Hawk had actually offered him a job. He claimed that he did not turn down any jobs, but he later indicated that he did not respond to Hawk Security's offer because the pay was too low (Tr. 28, 30).

If the claimant declines to consider a suitable available job, the judge may nonetheless find that it constitutes suitable alternative employment. Dove v. Southwest Marine, 18 BRBS 139 (1986) (the employee showed a lack of due diligence in trying to obtain a job by rejecting jobs paying less than $25,000.00 a year); Dionisopoulos v. Pete Pappas & Sons, 16 BRBS 93 (1984). Based on Harvey's testimony that the job was within Claimant's restrictions, her belief that he would have been hired if he were willing to take the job, and Claimant's own testimony, I find that suitable alternative employment was available to Claimant on October 25, 2000.

C. Claimant's Wage-Earning Capacity

The wage-earning capacity of an injured employee in cases of partial disability under subsection 8(c)(21) of the act is determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. 908(h). In the 26 4/7 weeks between October 25, 2000 and April 29, 2001, Claimant earned a total of $413.04, an average of $15.54 per week. The labor-market survey indicates that Claimant's wage-earning capacity during this period was significantly higher. Therefore, I find that, from October 25, 2000 until January 22, 2001, Claimant's wage-earning capacity was $7.25 per hour. This estimate, with which Harvey agreed (Tr. 51), is an average of the wages available in the labor-market survey plus the wages of the $5.75 per hour position at Hawk Security (EX 11, Tr. 41, 51). This hourly wage over a forty hour week yields an average weekly wage of $290.00. I also find that, from January 23 to April 29, 2001, Claimant's wage-earning capacity was $6.71 per hour, a figure reached by eliminating the Dominion job and averaging the wages of the remaining positions. This hourly wage over a forty-hour week yields an average weekly wage of $268.40.

III. Diligence

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). The record contains some evidence of a diligent job search. Claimant attended four days of job club (Tr. 36), and Harvey was able to confirm that he followed up with approximately seventeen employers (Tr. 43). He did obtain employment as a substitute teacher's aide, and he alleges that he took work in this position whenever it was available (Tr. 25). Harvey acknowledged that work was not available in this position every day, and there is no information regarding how many employees were competing for how many jobs on any given day (Tr. 46). Claimant also lists nine employers with whom he allegedly followed up on his own (CX 11). He testified without contradiction that he eventually obtained a job with the City of Hampton, although it did not begin until he had returned to work at the shipyard and had resumed his former wage-earning status (Tr. 25-6).

Weighing the evidence as a whole, however, I cannot find that Claimant conducted a diligent search. First, his behavior in the Hawk Security interview was not consistent with diligence. He stated that he did not want the job, and, by his own testimony, he effectively refused an offer of employment (EX 11-5). Later, he made inconsistent and non-credible statements about the content of the interview. These credibility problems cast doubt on Claimant's uncorroborated account of jobs that he applied for on his own. Even in the cases in which Harvey confirmed that he had followed up, Claimant has presented no evidence of the amount of effort that he actually put into the process. The claimant carries the burden on this issue, and I find that he has not shown that overall he conducted a diligent search.

IV. Compensation Rate

The adjusted compensation rate for Claimant's permanent partial disability from October 25, 2000 until January 22, 2001 is two-thirds of the difference between his pre-injury average weekly wage, $588.82, and his weekly wage-earning capacity of $290.00. Therefore, Claimant's correct weekly compensation rate for that period is:

2/3($588.82-$290.00) = $199.21

Following the same formula, his weekly compensation rate from January 23, 2001 until April 29, 2001 is:

2/3($588.82-268.40) = $ 213.61.

ORDER

It is hereby ORDERED that:

1. Employer shall pay Claimant temporary total disability compensation at a rate of $392.55 per week for the period from October 9, 2000 until October 24, 2000.

2. Employer shall pay Claimant temporary partial disability compensation at a rate of $199.21 per week for the period from October 25, 2000 until January 22, 2001.

3. Employer shall pay Claimant temporary partial disability compensation at a rate of $213.61 per week for the period from January 23, 2001 until April 29, 2001.

4. Employer shall pay interest at the treasury-bill rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director on all accrued unpaid benefits, if any, computed from the date on which each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

5. Employer shall receive credit for any benefits previously paid to Claimant.

6. Employer shall continue to furnish such reasonable, appropriate, and necessary medical care for Claimant's work-related injury pursuant to section 7 of the act.

7. Within thirty days of receipt of this decision and order, Claimant's attorney shall file a copy of a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty days to respond thereto.

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FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/cmp
Newport News, Virginia